No. 4889

United States
Circuit Court of Appeals

For the Ninth Circuit

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,

Appellant,

vs.

ELLA J. HARVEY, Claimant of the Gas Screw "SUQUAMISH," Her Tackle, Apparel and Furniture,

Appellee.

Brief of Appellant

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

HON. GEORGE M. BOURQUIN, JUDGE

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STATEMENT OF THE CASE

This is an action in limitation of liability of the petitioner, Kitsap County Transportation Company. The petitioner filed its libel and petition setting forth

that it is a corporation of the said district, owner of the Gas Screw "Suquamish," that a claim had been made against the vessel exceeding the value thereof, which claim was made on account of defects in the said vessel and negligence in the management of the said vessel. The petition further set forth that the vessel was manned and equipped in full compliance with the laws of the United States and fully found in every particular and was constructed in all particulars in compliance with the rules established by the laws of the United States. It further set forth that it had earned $4.90 in passenger fares and no freight and that neither the owner nor representative of the owner was present at the time the accident from which the claim arose occurred, or knew of the cause thereof until after the time of its occurrence, and that the said accident happened and that the loss, damage or injury occurred, without the privity or knowledge of the petitioner, but that one Ella Harvey claimed to have been injured by the negligence of petitioner and had brought suit in the state court to recover damages on account of said injuries, and would continue to prosecute petitioner unless restrained. That the said Ella Harvey claimed damages in the sum of $12,500.00 and that the said sum greatly exceeded the value of the said "Suquamish" and that

the said damage to claimant was due wholly to her own negligence.

Upon said petition the usual proceedings were had, appraisers were appointed, notice of appraisement was given, appraisement was duly made, a stipulation for value filed, monition filed and entered, and restraining order issued and served. (p. 5 to 9.)

The claimant filed and served her answer and claim and alleged therein, among other things, that the ladies' cabin was located in the hull or hold of said vessel and that the seats thereof were built on a platform raised about 10 inches above the plane of the cabin deck; that the seats were placed close together and that each row of seats is placed flush with and perpendicular to the side of the raised platform and that no place or platform was provided for the passenger to step upon before stepping into the narrow space between the two rows of seats; that the seats provided were small and cramped and that a woman passenger could not readily see the platform. The claimant denied that the alleged defects were plainly visible and denied that the vessel was equipped in full compliance with the laws of the United States and alleged that petitioner well knew the design and build of the platform and arrangement of chairs and rows of chairs for the accommodation of women passengers

when it adapted said vessel, so arranged, to the carriage of passengers and that said arrangement was dangerous when adapted to women passengers, all of which the petitioner then and there well knew, and that the foregoing raised platform, chairs and rows of chairs, constituted defects and imperfections in the hull within the meaning of Sec. 4493, U. S. R. S. Claimant further denied that the damage occurred without the privity or knowledge of the petitioner, and alleged that petitioner knew of the faulty defects and imperfect design, build and arrangement of the seating platform and its chairs and equipment. The claimant admitted the making of a claim and that the amount demanded was $12,215.50 and that the vessel was fairly appraised if a limitation was granted. Claimant further set forth that in the filing of the claim she did not intend to confer jurisdiction on the Court to determine the case upon its merits but made her claim without prejudice to her right to maintain her cause in the Superior Court. The claimant then set forth affirmative allegations substantially as set forth in her claim and answer to the petition, except to set forth the nature and extent of her injuries and the items of her expenses. (p. 10 to 18.)

To the allowance of the claim of claimant the petitioner duly filed its objections on the ground that if claimant suffered injury it was on account of her own

negligence and not on account of any fault or lack of care of petitioner. (p. 19.)

The case came on for hearing and the petitioner first submitted its evidence on its right to have its liability limited. The claimant then, without motion to dismiss the proceedings, submitted the proof of her claim and her evidence tending to controvert petitioner's right to limit its liability. At the close of claimant's testimony the petitioner moved the court to disallow the claim of claimant for the reason that no negligence of petitioner was shown; that all of the alleged defects were not in fact defects at all but were conditions, which were in plain sight and that claimant had admitted in her own testimony that her injury was caused by her own carelessness.

This motion being denied, the petitioner then entered its testimony controverting the testimony of the claimant, and again renewed its motion that the claim of the claimant be not allowed. The claimant at that time moved that the petition for limitation of liability be denied.

The Court rendered its decision dismissing the petitioner's proceedings for limitation of liability (p. 20) and thereafter rendered its judgment in conformity therewith. (p. 23.)

Specification of Error I

The Court erred in failing and refusing to make any finding or decision on the question of whether petitioner was guilty of negligence which caused or contributed to the injuries and damages, if any, sustained by the claimant, and that it failed to find that the petitioner was not guilty of negligence which caused or contributed to the injuries, if any, sustained by the claimant. (Assignments of Error 2, 4 and 5, p. 28.)

Specification of Error II

The Court erred in this: That it failed and refused to find and decide that if claimant sustained any damage or injury it was due to her contributory negligence which was the proximate cause of any injury sustained by her. (Assignments of Error 3, p. 28.)

Specification of Error III

The Court erred in this: That it failed to find and decide that the damages and injuries, if any, sustained by claimant were occasioned without any privity or knowledge on the part of the petitioner. (Assignments of Error 6, 7 and 8, p. 29.)

Specification of Error IV

The Court erred in this: That it entered an order judgment and decree dismissing the petition of petitioner for limitation of liability and awarding costs against the petitioner for the reasons set forth in the preceding assignments of error, and that it failed and refused to grant a rehearing and a new trial. (Assignments of Error 9 and 10, p. 29.)

Exceptions to the foregoing errors were allowed by the Court. (p. 25 and 26.)

ARGUMENT

Specification of Error I

The court erred in failing and refusing to make any finding or decision on the question of whether petitioner was guilty of negligence which caused or contributed to the injuries and damages, if any, sustained by the claimant, and that it failed to find that the petitioner was not guilty of negligence which caused or contributed to the injuries, if any, sustained by the claimant. (Assignments of Error 2, 4 and 5, p. 28.)

We think this error was induced from a fundamental misconception of the learned trial court in regard to its province, duty and jurisdiction in proceedings to limit liability. We believe it is manifest that the first

thing to be decided is: Was the petitioner guilty or not guilty of negligence? And, second, did the petitioner comply with the laws of the United States so as to entitle it to a limitation of its liability if it was guilty of negligence? If it was not guilty of negligence it is entitled to a limitation of liability as a matter of course, because it has no liability whatever and the limit must be zero. If it is guilty of negligence but complied with the laws of the United States, provided that the said negligence was not within the privity or knowledge of the owners, then it is entitled to a limitation of liability to the value of the vessel and its freight then pending. The learned trial court was content with the *assumption* that if the petitioner was negligent, or, in his words, "If the claimant is entitled to recover * * * it was by reason of known defects and imperfections," and yet, there is no decision or even intimation that the claimant *is* entitled to recover at all. In fact there is an intimation in the decision that she is *not* entitled to recover. The court's words "*claimant is entitled to pursue her common law remedy and case, if she has any,*" could be susceptible of no other interpretation than that a doubt existed in the mind of the trial court as to whether she was entitled to any recovery at all, but, the Court, instead of performing its duty, relegated the whole matter to another court without deciding the question

presented for his decision, disregarding the decisions it cites in its support, which preclude the administration of this branch of the admiralty from being hampered by proceedings in various and conflicting jurisdictions. It could make no difference on petitioner's right to limit its liability that "if there were any defects it is very plain that they were in the hull." To prevent limitation it is necessary to find that there *were defects in the hull*, and that petitioner knew there were defects in the hull and the Court is not entitled to indulge in "ifs." Any other conclusion must be a reversible error, for it results in this absurd condition: a petitioner cannot contest its liability in the proceedings independently of its rights to limitation of liability, or, in other words, if, in its proceedings for limitation of liability, it appears that it is *not negligent*, it cannot limit its liability, because it is unnecessary for the court to pass upon that issue and this admiralty question must be relegated to a common law court; on the other hand, it is only entitled to limitation when it actually is negligent, but without knowledge or privity of the same. This is not the law.

If we assume that "if claimant is entitled to recover it is because of a condition in the hull," and that then petitioner is not entitled to limit its liability, what then becomes of petitioner's rights if claimant

is *not* entitled to recover and what becomes of the allegations in the petition, denied in the claim and upon which proof is entered? If they are material to the petition and the claim are they not material to and required to be settled by the decision of the Court? Manifestly the vital question to be determined the Court failed to decide, though all the issues thereon were duly made up, all the parties interested were before the Court, evidence was offered pro and con, and the entire matter submitted to the Court for its determination. The evidence on both sides being entered without objection, there can be no question raised but that the Court had jurisdiction of the parties and of the subject matter of this alleged maritime tort. The theory of the Court, carried to its logical conclusion, would defeat the right to limit liability whenever it is *alleged* that an accident was caused by a "defect or imperfection of the steaming apparatus or hull" of the vessel, whether there were in *fact* such defects or not.

II.

On the second branch of this specification: The Court should, from the undisputed evidence, have found that the petitioner was guilty of no negligence whatever.

The arrangement of the seats is illustrated in the small photograph (Petitioner's Exhibit 2). L. H. Coolidge, a naval architect of nineteen years' experience in Seattle, testified that he had been acquainted with the "Suquamish" ever since she was built and that the seats and arrangement were the usual and standard type of construction in vessels of that type and class, and it was as safe as any other step made use of in vessel designing (p. 43 et seq.), and that he did not know of a better arrangement.

Frederick S. Brinton, a naval architect, practicing his profession in Seattle since 1897, testified that he designed the "Suquamish" and the seating arrangements, though not original with him, was as he designed them, and the appliances and equipment were of the usual and standard type for that class of vessels. Both of these architects stated that the arrangement gave more head room and greater stability to the vessel. (p. 49, et seq.)

Charles E. Taylor, who operates a large shipbuilding plant, testified that he was well acquainted with vessels of the kind and type of the "Suquamish"—had been building them for twenty-five years, and that the seating arrangement was the ordinary and usual arrangement in vessels of the character and type of the "Suquamish." (p. 56, et seq.) These were disinterested witnesses.

John L. Anderson, president of the petitioner corporation, testified that he had been an operator of steam vessels for thirty-eight years. He too testified that the seats and seating arrangement was of the standard type of the vessels of the character and size of the "Suquamish." Each of these witnesses gave one or more examples of other vessels in which the seating equipment and arrangement were identical with the "Suquamish." (p. 60 et seq.)

Philip D. Macbride, vice-president of petitioner corporation, testified that he was acquainted with nearly all the vessels of this type and class on Puget Sound. That the equipment was the standard type and arrangement; that the vessel had been in operation since 1914; had carried over 40,000 people per year, an aggregate of about 500,000 passengers, and that no accident of this kind had ever theretofore occurred. (p. 37, et seq.)

We call the *particular attention* of this Court to the fact that no where is it contended by the claimant that there was any defect or fault in the chairs, in the step, or in the floor. In fact it is not contended otherwise, and must be conceded that there was nothing to cause claimant to slip or trip or cause her injury on account of anything whatever not being in perfect condition. There was no cleat, no worn place,

and nothing whatever was allowed to get out of order or become imperfect; and claimant makes no contention that there was any defect or imperfection with respect to such matters. The sole fault, if any, was in the arrangement. In other words, the equipment in itself was perfect. Aside from the evidence of the witnesses above mentioned, the vessel in this exact condition in regard to this equipment and arrangement, was passed and approved by the United States steamboat inspectors. (p. 54, Petitioner's Exhibit 1.)

This evidence of the petitioner is undisputed by any statements, fact or circumstance worthy of the name of evidence. How can an owner be guilty of negligence who has seating arrangements designed by a professional and competent architect of standing and experience, the arrangement passed upon by the United States inspectors, has kept the seats and equipment in perfect condition during all the years since they were built, and has carried 500,000 passengers without mishap? What other answer can be given to the question than that the owner was without negligence? It was therefore incumbent upon the Court to make a finding that the petitioner was without negligence and especially is this true when it is shown how the accident really happened by the

testimony of the claimant (p. 78), from which we quote, as follows:

"Q. You stepped up?

"A. I certainly did.

"Q. And there was nothing to prevent you from seeing that you stepped up?

"A. Nothing at all. * * *

"Q. Was there anything to prevent you seeing the floor?

"A. Nothing but carelessness maybe. I looked up instead of down.

"Q. But you could have looked down if you had wanted to, couldn't you?

"A. I suppose I could. I was looking at the door —how to get out. * * *

"Q. Now all the time that you were going on that trip, Mrs. Harvey, was there anything to prevent you looking down at the floor and seeing just how that step stepped off?

"A. I don't know that there was.

"Q. Did you notice it when you stepped up?

"A. Certainly. Certainly I knew that.

"Q. And when you noticed that you stepped up you would know that you would have to step down when you got off wouldn't you?

"A. I presume so." (pp. 78-79-80.)

Claimant's daughter, who accompanied her on the trip, testified as follows:

"Q. When you went into those seats you necessarily had to step over (up); must have know there was a step when you stepped up?

"A. Perhaps. * * *

"Q. And Mrs. Harvey had simply to look across to see the step on the other side?

"A. If she had looked.

"Q. And she could have looked if she had wanted to?

"A. She was not anticipating this fall.

"Q. She could have seen this step? There was nothing to prevent her from looking. The step was in plain sight was it not?

"A. I suppose.

"Q. Also the step you took to get to the chair on which she was seated was in plain sight when she took the chair?

"A. I presume so. (p. 71.)

In *Savage v. N. Y. & N. H. S. S. Co.*, 185 Fed. 778, decided by the Circuit Court of Appeals for the Second Circuit, it appeared that the vessel was so constructed that a chain box, covering a necessary part of the steering gear, extended on both the port and starboard sides of the vessel from the deck house to the rail, and that such type of construction was common and well known in passenger vessels of the size and age of the vessel in question. Plaintiff in the action was injured in stumbling and falling over the chain box, and claimed negligence in the manner in which it was constructed, but the Court held that negligence of the owner *could not be predicated* on the structure of the vessel although there was evidence that a sloping cover for the steering chain would have

been less dangerous. The law of that case is especially applicable to the facts of the case at bar, for which reason we quote the following from the decision:

"It is proved without contradiction that the particular construction or arrangement of the steering gear is extremely common in vessels of the age and size of the "Rosalind" and has long been well known in vessels used for passenger traffic. Therefore, no negligence as against the owners of the vessel can be predicted on the construction of the ship, but it has been said, inasmuch as the promenade deck has been given over to the use of passengers and as the structure in question is one over which people may fall, peculiar care is necessary in guarding or warning passengers exposed to this possible injury. This may be true, but it is not necessary to dwell upon it in the case because of the finding heretofore made that during all of the time that Mrs. Savage was on board the "Rosalind" until the time of the accident the obstruction was obvious and that which is obvious to one of ordinary intelligence and in possession of his physical senses does not require warning."

To the same effect and a quite similar case is "The Southside," 155 Fed. 364, where liability was limited.

Negligence is never presumed but must be proven, and the mere fact that an accident happened or an injury received gives rise to no presumption of negligence. In the case at bar there is not only a failure of proof of any negligence, but there is affirmative

proof that petitioner was free from negligence, and it was the duty of the trial court to so find and dismiss and disallow the claim, retaining jurisdiction of the petition for limitation for that purpose.

Specification of Error II.

The Court erred in this. That it failed and refused to find and decide that if claimant sustained any damage or injury it was due to her contributory negligence which was the proximate cause of any injury sustained by her. (Assignment of Error 3, p. 28.)

Claimant asserts these grounds as the basis of her right to recovery:

(a) The seats on a platform being 10″ above the level of the aisle between them;

(b) The seats being too close together;

(c) Failure to post a notice or warning of the existence of the step.

We take up the latter point (c) first and ask: What purpose could a notice serve which could not be more obvious than the thing itself? An examination of Exhibit 2 will disclose that there was no difference between the step to the platform on which the seats were placed and the steps of the stairs. The steps on the stairs leading down to the cabin were of the same kind. What object could there be in posting a notice saying: "These are steps. You step down"; or, at

the bottom: "These are steps. You step up?" The cabin was well lighted—each side of a fourteen foot cabin consisting of a row of windows—and it was a bright, sunny day. (p. 67.) If a step that one must both see, feel and experience in stepping up would not be observed, why should it be assumed that a notice calling attention to a thing so obvious would be seen or heeded? A notice is only required in law to direct attention to some hidden defect, some trap or something not open and obvious as was said in the Savage case, supra: "that which is obvious to one of ordinary intelligence and in possession of his physical senses does not require warning." We submit that there is no merit in the contention that a notice should have been posted.

As to her claim (b) that the seats were too close together, we answer that the seats were regular theatre seats. They were placed about 29 inches apart which is the standard distance between seats in theatres, churches and trains. The seat itself could be raised if the occupant desired when passing out. Indeed, a witness for claimant testifies that they were very similar to seats in a street car, and that each of these seats was perfectly visible is evidenced by the testimony of the claimant herself. (p. 78.) There were very few passengers on board that day. (p. 79.)

As to claimant's contention (a) with respect to the raised platform, we answer that in addition to the fact that the construction was of the usual manner in like vessels, that this condition was perfectly apparent, and open to anyone who was in possession of his faculties, and of practically the same type of construction as the platform upon which is placed the witness chair in a court room, or the rear row of the seats of jurors in practically all jury boxes everywhere. That the claimant was injured simply and solely because of her failure and refusal to use her faculties is perfectly apparent from an inspection of Petitioner's Exhibit 2, and from a perusal of her own testimony.

In the case of *Johnson v. Port Washington Route*, 121 Wash. 460, recovery was denied to a passenger on a vessel who was injured in stepping off the end of a gangplank. We quote from the syllabus in that case as follows:

"That a passenger alighting from a steamboat in broad daylight is guilty of contributory negligence precluding recovery where she stepped off the end of the gangplank without looking to see if there was another step at the end of the gangplank and fell because of her failure to use her faculties."

We also call attention the following cases:

Dunn v. Kemp & Herbert, 36 Wash. 183,

denying recovery to a person injured in falling down a store stairway which was in plain view;

Hollenback v. Clemmer, 66 Wash. 565,

holding that the mere fact that one step down is maintained at a side exit of a moving picture theatre is not evidence of negligence where the way was properly lighted.

Hogan v. Metropolitan Building Company, 120 Wash. 82,

denying recovery to a customer of a store who stepped on an inclined entrance, where the incline was open and apparent, and no steeper than many entrances to similar places in the same city.

Although a common carrier of passengers may be held to exercise the highest degree of care compatible with the safe operation of the utility, the carrier is not an insurer of the safety of the passengers, and these cases show that steps up and down are so common and human experience is such that the law has become established that no neglect of duty exists where the steps are open and obvious to those entitled to use the same.

Hutchinson on Carriers (3rd Ed.) Vol. 2, Sec. 942, after stating conditions which would hold a carrier liable, states:

"But he cannot be held responsible for injuries received from obstructions on a wharf or vessel which

were in plain view and could easily have been avoided by the passenger."

citing *Strutt v. Brooklyn, etc., Ry. Co.*, 45 N. Y. S. 728, where recovery was denied a passenger who stumbled over a hose on a wharf, and *Sedden v. Beckley*, 25 Atl. 1104, where the carrier was held not liable to a passenger who stumbled over a gangplank in its usual place on the vessel.

We also call attention to

> *Race v. Union Ferry Co.*, 138 N. Y. 744; 34 N. E. 280,

denying recovery to a passenger who fell in stepping down from the bridge on to a ferry;

> *Fogassi v. N. Y., etc., R. R. Co.*, 45 N. Y. S. 175,

relieving a railroad company from liability to a passenger for injuries received in leaving a vessel by the gangplank and stepping off the same and falling into the water. The Court in the last case cited says:

"Passengers upon public conveyances are bound to take some care of themselves and where there is a manifest danger they are required to use reasonable care to avoid it."

Specification of Error III.

The Court erred in this: That it failed to find and decide that the damages and injuries, if any, sus-

tained by claimant, were occasioned without any privity or knowledge on the part of petitioner. (Assignments of Error 6, 7 and 8.)

The trial court, in its decision on this point, says:

"Now, in the instant proceedings, it is very clear that if claimant is entitled to recover it is because of a condition of the hull (see The Europe, 175 Fed. 608; 190 Fed. 479) of the vessel, which was actually created and maintained by petitioner—because of and by reason of known defects and imperfections. Hence, all within petitioner's privity and knowledge. That is to say, the grounds upon which alone a ship owner's liability can be limited are conspicuously absent. That ends these proceedings. For if, in these proceedings it should appear that the disaster did happen with his privity and knowledge * * * he would not obtain decree for limited liability. Butler v. Co., supra."

The trial court fell into two errors in the conclusions of its decision on this point. One error is due to the assumption of the Court that because a certain *condition* existed, which was created at the time of the construction of the vessel, and hence within the knowledge and privity of the owners, that the petition must be dismissed. But, the trial court failed to grasp the essential feature of the right to limit liability, which is, not that the owners of the vessel shall have knowledge of a condition, but they must have knowledge that the condition was dangerous,

was defective or imperfect, or that it was created by their personal negligence. The trial court begged that important question by stating that "if the claimant is entitled to recover, it is because of known defects and imperfections." That is the very question which the trial court was called upon to determine, viz., whether the condition which it found to exist was defective or imperfect. If it had found that the condition constituted a defect and imperfection, its conclusion might follow that it was within the privity or knowledge of the owners and hence defeat the right to limitation. The inference may well be drawn from the language of the Court that it did not regard the condition as defective or the claimant as entitled to recover for the language used is: "If claimand is entitled to recover, etc."

While the Court is no doubt familiar with Sec. 4283 of the U. S. Revised Statutes under which the proceedings are brought to limit liability, we here set forth that section for the convenience of the Court, as follows:

"The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred without the privity, or knowledge of such own-

er or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

It must be conceded that under the record in this case the actual occurrence by which claimant was injured was without the privity or knowledge of the owner of the vessel. It had no personal knowledge that claimant was a passenger or that she had been injured until the matter was brought to its attention some time after the incident. It seems to us it must be held that it was "done, occasioned or incurred without the privity or knowledge of the owner." However, if it be assumed, as the trial court did, that the owner had knowledge of the *condition* which resulted in the injury, that is a very different matter from assuming that it had knowledge or privity that such a condition was defective. The trial court did not pretend to decide that the condition was defective. We are satisfied that the evidence conclusively established that the condition was not defective. But, in any event, if the statute is to be construed so as to deny the limitation where an accident is one of which the owner had no personal knowledge, but was due to a condition of which it had knowledge, before the limitation can be denied, the condition must be shown to be a defect and that the owner had actual knowl-

edge, or at least constructive knowledge, that such a condition constituted a defect.

The "Annie Faxon," 75 Fed. 312 (9th C. C. A.), cited by the trial court in its decision, is in no sense an authority sustaining the conclusions of the trial court. On the contrary, it sustains the contention of petitioner that the limitation should be granted, because it shows that the privity or knowledge necessary to defeat the limitation will not be imputed to a corporation unless the defect (not condition) was apparent and of such a character as to be detected by the inspection of an unskilled person, if the corporation has, in good faith, employed a competent person to inspect the vessel. We quote from the decision in the "Faxon" case as follows:

"We are unable to perceive how there could be imputation of privity or knowledge to a corporation of defects in one of its vessels' boilers unless the defects were apparent and of such a character to be detected by the inspection of an unskilled person. * * * It is sufficient if a corporation employ in good faith a competent person to make such inspection. When it has employed such person in good faith and has delegated to him that branch of its duty, its liability beyond the value of its vessel and freight ceases so far as concerns injuries and defects of which it has no knowledge and which are not apparent to the ordinary observer but require for their detection the skill of an expert."

In the "Faxon" case it appeared, as in the instant case, that the owners had caused the vessel to be inspected by the United States Inspector of Hulls and Boilers, as required by law, and this, in connection with the employment of skilled engineers, as in the instant case, the owners had employed skilled architects and constructed the vessel in accordance with standard type of construction used in such vessels, was sufficient to entitle the owners to limit their liability. So it seems plain that it was not only the duty of the trial court to find whether a defect existed, but also to find that the owner had knowledge that it was a defect, before it could dismiss the petition.

Some *dicta* in the "Erie Lighter 208," 250 Fed. 490, are relied upon as authority for the decision of the trial court. In that case the Court states as follows:

"That it is necessary, primarily, to determine whether the petitioner is entitled to limit its liability. If it is, this court may undoubtedly proceed to determine whether it is liable at all, and, if so, to fix and assess the damages that should be awarded to claimant. * * * On the other hand, *if the petitioner may not avail itself of the limited liability statutes*, it would seem beyond any authority and reason that at least without claimant's consent this court is without jurisdiction to proceed further but must dismiss the proceedings, leaving the claimant free to pursue his remedy in the courts of New Jersey." (Italics supplied.)

Distinguishing these statements from the case at bar, however, it will be noted that the Court in the instant case did *not* determine that the petitioner was *not entitled to limit its liability.* It only determined that *it was not* entitled to limit its liability *if the claimant is entitled to recover,* and did not decide at all that the claimant *was* entitled to recover or that the petitioner had knowledge or privity of any defects, but only that the petitioner had knowledge or privity of the defects *if there were any,* which makes a vast distinction between the above statement in the case of the "Erie Lighter 208" and the instant case. However, the authority of the "Erie Lighter" in that matter may well be questioned.

In the first place, it is but the *dictum* of a *nisi prius* court. It is not agreeable to the holding of the District Courts sitting in the State of Washington.

In the second place, the Court in that case does not hold in conformity with the *dictum* above set forth, and this *dictum* is not fortified by the decisions cited in support of its decision. The Court actually holds in favor of the petitioner, and *allowed its limitation of liability,* though it did find that the injuries were "due wholly to a structural defect of the lighter." The Court says:

"I have no doubt that the petitioner's liability should be limited to the value of the latter vessel. If the decision of the Circuit Court of Appeals of the 6th Circuit in Thompson Towing Co. v. Wrecking Association, 207 Fed. 209, is at variance with this conclusion, I do not think that that case can well be reconciled with the decisions of the Circuit Court of Appeals of the 2nd Circuit above cited. The latter, I think, present the view which is more in harmony with the spirit in which the Supreme Court has many times held that the limitation of liability act should be construed."

It will thus be seen that if the theory of the claimant in the instant case is correct, that the defects, conceded for sake of argument to be a part of the hull, (which we deny and to which we shall hereafter refer) were structural defects in the original structure and the right to a limitation would be granted even under the authority of the "Erie Lighter."

In the third place, if the case is susceptible of the construction and application given it by the learned trial court, it has, so far as any such application and construction are concerned, been repudiated by the Circuit Court of Appeals for the Second Circuit in the 84-H Appeal of Bouker Contracting Co., 296 Fed. 427, decided December 17, 1923, in which case it is referred to. We quote from the decision in the Bouker Contracting Co. case:

"In the instant case the court below found that the petitioner was not negligent. The evidence, said the court, showed that the work was conducted in the usual way. * * * I can, therefore, find no negligence on the part of the contracting company. If there was no fault or negligence for the ship owner to be privy to and have knowledge of within the meaning of the statute, there is no liability to be limited *and the court should have granted the petition. Instead the petition was dismissed and the injunction staying the proceedings in the state court was vacated. This was manifest error.*" (Italics supplied.)

In the Bouker case the construction placed upon the "Erie Lighter" case, and that it is not consistent with the application given the case by the trial court, is shown in the further quotation from the Bouker case:

"The company, however, knew all about the method of conducting business at the dump. Indeed privity or knowledge was admitted by the general superintendent when testifying. Under such circumstances, the proctor for the administrator of Friend says the proceedings to limit should be dismissed because privity is admitted and privity is a complete bar to the statute of limitation. This was done in cases where *negligence* and *privity* were *both shown.* See Erie Lighter 108, 250 Fed. 490, and other cases therein cited. The mistake in this case was due to the fact that this is not a case where *negligence* and *privity* were *both* shown. Where there is *no negligence and no fault, privity is a matter of no consequence.* The decree is reversed and the District Court is instructed to reinstate the petition and enter a decree exempting the

petitioner from all liability as prayed for in said petition, and issue an injunction, as also prayed in the petition aforesaid." (Italics supplied.)

We call the Court's attention to the fact that in the instant case the Court's own decision is tantamount to a finding that he could find *neither privity* or *negligence* of the petitioner, and it is conclusively shown by the evidence that there was no privity or negligence of the petitioner. The evidence conclusively shows that the seats were arranged in the usual way for boats of that kind and character which brings the cause squarely under the law as laid down in the appeal of 84-H, *supra.* This should dispose of the "Erie Lighter" so far as being an authority for the decision of the trial court in the case at bar.

The later decisions,

Pocomoke Guano Co. v. Eastern Trans. Co., 285 Fed. 7, decided by the C. C. A. for the 4th Circuit, Nov. 7, 1922;

City of Camden, 292 Fed. 93, L. C. 97, decided by C. C. A. of the 3rd Circuit in March, 1923;

Petition of Can. Pac. Ry. Co. the Princess Sophia, 278 Fed. 180,

all fail to follow any such interpretation of the "Erie Lighter" as could be construed in support of the decision of the trial court in the instant case.

That the trial court should have determined the question of negligence or of defect, as well as privity or knowledge, as was held in the 84-H Appeal of Bouker Contracting Co., 296 Fed. 427, supra, is settled by the early decision of the Supreme Court of the United States in the case of *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578. In that case the Court says, referring to the statute for limitation of liability:

"The question to be settled by the statutory proceeding being, *first*, whether the ship or its owners are liable at all (if that point is contested and has not been decided); and, *secondly*, if liable, whether the owners are entitled to a limitation of liability."

The first question the trial court in the case at bar did not decide at all, thus disregarding the duty imposed upon it by the Supreme Court of the United States.

The trial court also cites the case of *Weisshaar v. Kimball S. S. Co.*, 128 Fed. 397, (cited as Weisshaar v. Co.) as sustaining its decision. That case is, we think, in perfect harmony with the appeal of 84-H, *supra*, and correctly states the law. It does not at all, however, state the law as the learned trial court assumed it to be. In that case the negligence of the petitioner was proved and so decided. The knowledge and privity of the petitioner was proved and decided.

Both elements rendering proper the dismissal of the petition, as explained in the 84-H decision, were present. In the instant case neither element existed, nor did the trial court intend to imply or infer that they did exist. He evidently did not consider the existence of the first element as necessary or even proper for him to consider.

The second error into which the trial court fell was in applying to this case the provisions of Section 4493 of the U. S. Revised Statutes, which for the convenience of the Court we set forth as follows:

"Whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured to the full amount of damage if it happens through any neglect or failure to comply with the provisions of this Title, or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or wilful misconduct of any master, mate, engineer or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer or pilot, and recover damages for any such injury caused by any such master, mate, engineer or pilot."

It may well be doubted whether this section of the Revised Statutes was ever intended by Congress to have any application to proceedings for limitation of

liability. Section 4493 was passed by Congress February 28, 1871, (U. S. Statutes at Large, Vol. 16, p. 453). At that time Section 4283 (the limitation of liability statute) was then in effect, having been passed by Congress March 3, 1851, (U. S. Stat. at Large, Vol. 9, p. 635). Section 4493 is a part of the Steamboat Inspection Law, and we doubt if it was ever intended to fix any rule of liability against any owner who had complied wtih the inspection laws of the United States, as was done by the petitioner in the instant case. In fact that seems to be the gist of the holding in the "Annie Faxon," 75 Fed. 312, *supra*, wherein petitioners, who had had the boilers of the vessel inspected by the U. S. officers, were permitted to limit their liability. In that case, after noting that the owners had caused the inspection to be made and had received a certificate authorizing operation of the vessel for a year, the Court says in response to the objection of the claimants that the certificate was void because of neglect of duty of the inspectors:

"To this it may be said that if the local inspectors, who are public officers, failed to perform their duty, and made an insufficient examination of the vessel, the fault does not rest upon petitioners, nor is there imputation to them of knowledge of such defective inspection, they having delegated the whole matter of the inspection of their vessels to a competent employe."

Surely the certificate of inspection (Petitioner's Exhibit I) issued in the instant case means something. If the officers of the law, presumed to be competent and qualified, inspected the "Suquamish" and issued a certificate approving her operation, it should be conclusive that no defect existed in the vessel of which the owners would be held to have knowledge. The owners of the vessel are not necessarily presumed to be skilled navigators or shipbuilders. They are usually business men. It was to encourage business men to invest in shipping that the limitation of liability statute was passed. If these skilled inspectors did not find in the manner in which seats and platforms were constructed any defect, how can knowledge be imputed to the owner that such a condition was a defect for which it could be held liable?

A reading of the statute shows that the owners are only to be held liable for *known* defects. They are not liable for known *conditions*, unless the conditions are defects, and are known by the owners to be defects. Under the facts of this case, what is there to impute to the owners any knowledge that the conditions complained of were defective? The vessel was constructed under the supervision of a naval architect and was of the same style of construction with respect to seats and platform as other vessels of like

type and class. The vessel had been engaged in the passenger service 13 years, during which time she had carried approximately half a million passengers without a single mishap or accident similar to the one complained of in this case (p. 39). How, we ask, under such circumstances, could there be any knowledge imputed to the owner of this vessel that there existed any defect or imperfection with respect to seating arrangement of the vessel?

Furthermore, Section 4493 only fixes a liability upon the owner for a defect or imperfection existing in the *hull.* Therefore, we pass to a consideration of whether the seating equipment of the vessel was a part of the hull. The trial court was mistakenly of the opinion that the decision in "The Europe," 175 Fed. 608; 190 Fed. 479, was authority for holding the seating arrangement to be a part of the hull. That was a case interpreting the rule requiring a light to be carried twenty feet above the hull and therefore rendered necessary a construction of the word "hull" under that rule. There is no doubt that in that case the word "hull" was used in its colloquial sense. In other words, it meant the bulk or form of the vessel. It would do no good to carry a light twenty feet above the real hull as it might be inside one of the cabins or hidden by other portions of the house or upper works of the vessel. The purpose of the rule was to require

a light to be carried so that it could be seen on all sides of the vessel and manifestly the word "hull" was meant to include all that portion of the vessel which would obscure lights and the decision in the "Europe" so holding was only consonant with good common sense. The meaning of the word "hull" in the instant case, however, is an entirely different matter. It is perfectly apparent that the statute does not intend to include the whole of the vessel. Even Congress would not be so prodigal of words as to say through "known defects of the steaming apparatus and the hull" when it might say "known defects of the vessel." It is patent that among the things it did not intend to include were tackle, apparel, furniture and equipment mentioned in every libel that intends to include a libel of the whole of the vessel. In other words, it did not intend to include among other things non-permanent portions of the vessel. The chairs, the manner in which they were arranged, the equipment on which they were placed, under Statute 4493, are no more parts of the hull than the card-tables, the carpets or the bird cage. It is an *ex cathedra* statement of the learned trial court that "It is clear that if claimant is entitled to recover it is because of a condition of the hull." However, the *condition* of the hull has nothing to do with it. It is defects in the hull that were alleged and that was ma-

terial. This statement of the Court is based neither on the law nor on the evidence. Aside from the reasonable interpretation of the statute, as above set forth, all the witnesses who could by any possibility have any knowledge upon the subject, to-wit: Coolidge (p. 44), Brinton (p. 49), Taylor (p. 57) and Anderson (p. 61), testified that the equipment involved was no part of the hull, so the testimony, so far as testimony goes, furnishes no basis for the statement of the Court. It is equally clear that the authority cited ("The Europe," supra,) has no bearing whatever on the instant case, for all that that case decided was that Section 4493 was not modified or reversed by subsequent enactments and that under the rule involved therein the whole of the vessel was included in the word "hull," neither of which propositions are involved in the instant case.

Specification of Error IV.

The Court erred in this: That it entered an order, judgment and decree, dismissing the petition of petitioner for limitation of liability and awarding costs against the petitioner for the reasons set forth in the preceding assignments of error and that it failed and refused to grant a rehearing and a new trial. (Assignments of Error 9 and 10.)

This Specification of Error refers to the signing of the decree and the failure to grant a rehearing and a new trial.

To further argue these points is unnecessary, as they are covered by the argument under the preceding specifications, but that the decree should not have been signed, or, having been signed, should be set aside because contrary to the law and the evidence, is quite plain from the record in the following particulars:

(1) The Court failed to make any Findings of Fact at all. (Assignment of Error I, p. 28.) In the present case this was obligatory. The fact of whether or not the petitioner was negligent was a necessary fact to be adjudicated.

(2) The fact of whether the acts of the claimant caused her injuries was a necessary fact to be decided as the petitioner could not be guilty if the claimant's negligence caused her injuries. This the Court failed to decide.

(3) Whether there were or were not any defects in the vessel was a necessary fact to be decided and to hold that *if* claimant is entitled to recover it must be due to conditions of which petitioner had knowledge is by no means a decision of this point—it simply begs the question. If it were not obligatory on the

Court to make these findings one way or the other, it would certainly have been improper not to do so in the instant case. If the Court had made the finding that the petitioner was guilty of any negligence, that negligence could have been readily pointed out in the record, and be shown to be either valid or invalid. If the Court had decided that the claimant was not guilty of the negligence that caused the injury, it could then be readily determined, as a matter of law, whether or not her claim should be disallowed, but under the decree we are left entirely in the dark except as to the speculative and conditional statements of the Court contained in the decision.

There is another phase of this matter. After introducing evidence in support of her claim, and at the conclusion of all the evidence claimant moved for a dismissal of the petition. (p. 91-92.) This the claimant may not do. If it be admitted, as was stated in the "Erie Lighter," *supra*, that where both negligence and privity or knowledge are shown, the court is without jurisdiction and the petition must be dismissed unless the claimant consent to jurisdiction, how, we ask, is consent given? Can the claimant come into the admiralty court, present her claim, cross-examine the witnesses for the petitioner, submit her own evidence without objection to the

Court's jurisdiction, and then, after all the evidence is submitted without objection, move for a dismissal of the proceedings? It seems that on reason and common sense that the motion at that time comes too late and that the claimant has consented. If she was not consenting, why was she, at the close of petitioner's evidence, entering her own? What was the effect of entering that evidence? Having thus submitted her cause, with testimony without objection, to a tribunal having jurisdiction of the persons and the subject matter, it would seem that if actions only speak equally as loud as words that she has consented and could not present, at that time, a motion for a dismissal.

We, therefore, respectfully submit the following:

That all the essential allegations of the petition were proven;

That petitioner was shown to have been free from negligence, and that even if defects had been shown to exist in the vessel, that they were defects unknown to petitioner, and hence without its privity or knowledge;

That the injuries of claimant were shown to have been the result of her negligence alone;

That the prayer of the petitioner should have been granted and the claim of the claimant disallowed and the limitation of liability decreed exempting the petitioner from all liability.

We, therefore, pray that this Court will reverse the decision of the trial court and direct the entry of the appropriate orders and decree.

Respectfully submitted,

BYERS & BYERS and
JOHN A. HOMER,
Proctors for Petitioner
Kitsap County Transportation Company